Nos. 17-2432 & 17-2454

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee Cross-Appellant,

v.

COSTCO WHOLESALE CORP.,

Defendant-Appellant Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
No. 1:14cv6553, Hon. Ruben Castillo

REPLY BRIEF
OF PLAINTIFF-APPELLEE CROSS-APPELLANT
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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INTRODUCTION

In this cross-appeal, Plaintiff-Appellee Cross-Appellant Equal Employment Opportunity Commission asks this Court to decide a narrow threshold issue: whether the EEOC may pursue backpay on behalf of Charging Party Dawn Suppo based on the theory embraced by this Court in *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993). The district court's decision below was limited to that threshold question, and did not reach whether the EEOC could establish causation or mitigation. Therefore, the Commission does not ask this Court to consider those questions. Rather, if this Court agrees with the Commission that it may pursue backpay on Suppo's behalf, the Commission requests a remand for further proceedings in the district court so it can decide in the first instance the issues of causation and mitigation.

As the EEOC argued in its principal and response brief, *Townsend*, rather than *Hertzberg v. SRAM Corp.*, 261 F.3d 651 (7th Cir. 2001), controls this case, because *Townsend* involved a fact pattern where an employee was "forced to take unpaid leave" due to the employer's unlawful action. 995 F.2d at 693. The district court relied instead on *Hertzberg*, but, as the EEOC explained, *Hertzberg* is inapposite because it addresses a scenario where an employee "leaves his or her employment as a result of the discrimination." 261 F.3d at 659. Contrary to the district court's conclusion, and Defendant-Appellant Cross-Appellee Costco Wholesale Corporation's arguments in its response and reply brief, *Townsend*

remains good law, as neither *Hertzberg* nor the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, invalidated *Townsend*.

Finally, although causation and mitigation should be reserved for remand, we note that the trial record provides ample basis for a finding by the district court that Costco's unlawful action caused Suppo psychological distress that, in turn, caused her to lose wages. The jury's determination that Costco is responsible for Suppo's emotional distress and pecuniary damages warrants deference on remand. Moreover, the EEOC contests Costco's characterization of the record evidence regarding Suppo's mental health history and treatment, which Costco raises in a misguided attempt to suggest she failed to mitigate her damages.

ARGUMENT

I. The Commission asks this Court to address only the threshold issue that the district court decided—whether the Commission may pursue backpay on Suppo's behalf under *Townsend*—and to remand for a causation determination.

The EEOC's principal and response brief explained that the district court's decision addressed a threshold question: whether the EEOC could obtain backpay on Suppo's behalf as a matter of law. EEOC Br. 4-5. Before trial, the parties agreed that the district court should determine backpay damages. R.194 at 42 / 9641 (ECF No.14-2) (Final Pre-Trial Order).[1] However, the district court's order denying

[1] R.__ refers to docket entries in the district court. When a pincite is provided, the page number(s) before the forward slash represents the internal page number(s) of the document and the page number(s) after the forward slash represents the "PageID" number(s) assigned by the ECF filing system. ECF No.__ refers to docket entries in this Court. References to ECF No.__ do not include pincites because portions of the record transmitted to this Court retained their original pagination.

backpay did not quantify damages because it held as a matter of law that the EEOC could not pursue backpay. R. 273 at 11-13 / 14624-26 (SA.18-20; ECF No. 14-12) (Post-Trial Op.).[2] The district court reasoned that *Townsend* was inapposite and that backpay was unavailable under *Hertzberg*. *Id.*

Therefore, the district court did not address the parties' other arguments regarding backpay. In particular, the district court did not consider whether the EEOC satisfied the standard in *Townsend*, which states that, where a Title VII violation "caused severe psychological distress that in turn caused [an employee] to lose work and as a result wages, [the employee] is entitled to recover those wages[.]" 995 F.2d at 693; s*ee also* R. 255 at 2 / 14380 (ECF No. 14-12) (EEOC Mot. Backpay). Nor did the district court consider the scope of Suppo's backpay or Costco's mitigation arguments.

Accordingly, in this cross-appeal, the EEOC asks this Court only to resolve this threshold question of whether the EEOC is eligible, under *Townsend*, to obtain backpay on Suppo's behalf. Although the EEOC does not ask this Court to address whether the trial record supports a finding of causation (or mitigation), this Court may wish to provide guidance for the district court in making that determination on remand. In the EEOC's view, the district court should apply *Townsend* and assess whether Costco's unlawful action "caused [Suppo] severe psychological distress that in turn caused [Suppo] to lose wages." 995 F.2d at 693. Also, as described in greater

[2] SA.__ refers to pages in Costco's Short Appendix. *See* ECF No. 12-2.

detail *infra* at 17-18, the district court should accord the jury's verdict significant deference in making this determination.

Costco claims that the EEOC must establish that Costco's unlawful action was "the absolute or only cause of Suppo's leave of absence," Costco Resp. 36, but provides no support for this standard. While it may be possible to infer that *Townsend* requires but-for causation, nothing in *Townsend* suggests that an employee must demonstrate that the employer's action was the "absolute or only cause" of her psychological distress and lost wages. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528, 2533 (2013) (applying "traditional principles of but-for causation" to interpret Title VII's anti-retaliation provision, which prohibits discrimination "because [an employee] has opposed ... an unlawful employment practice ... or ... made a charge" (quoting 42 U.S.C. § 2000e-3)); *Carson v. Lake Cty.*, 865 F.3d 526, 533 (7th Cir. 2017) (observing that Age Discrimination in Employment Act plaintiff must show that age was a "'but for' element" but "need not prove that age was the sole motivation underlying an adverse action"); *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 218 (4th Cir. 2016) (explaining, in a Title VII retaliation suit, that an employee's "burden is only to show that the protected activity was a but-for cause of [an adverse action], not that it was the sole cause"). On remand, the district court should apply *Townsend*'s standard rather than requiring the EEOC to demonstrate sole causation.

II. This Court should hold that *Townsend* authorizes backpay under the facts of this case.

A. *Townsend*, not *Hertzberg*, controls.

As the EEOC explained, *Townsend*, not *Hertzberg*, is relevant to this case. EEOC Br. 46-48, 51-52. In *Townsend*, an employee took an unpaid leave of absence because she suffered severe psychological distress after her supervisor sexually assaulted her and her employer failed to address her complaints. 995 F.2d at 692-93. This Court held that the employee could obtain backpay if she could establish that the harassment she experienced "inflicted the kind of harm for which Title VII offers redress," emphasizing that Title VII "does not key the plaintiff's rights to termination but to discrimination, of which sexual harassment has been held to be a form." *Id.* at 693.

By contrast, in *Hertzberg* an employee sought backpay after separating from her employer. 261 F.3d at 655-56. This Court held that the employee could not obtain backpay because the jury rejected her retaliatory discharge claim and because she never asserted constructive discharge. *Id.* at 657, 660-61. Therefore, this case, in which the EEOC argues that Suppo was forced to take unpaid leave, is analogous to *Townsend*, not *Hertzberg*.

Costco claims that *Hertzberg* is the relevant precedent because the EEOC's "constructive discharge claim was dismissed on summary judgment ... and [Suppo's] termination was not otherwise found to be unlawful or discriminatory." Costco Resp. 33. But the EEOC does not predicate its backpay argument on the idea that Suppo's termination was unlawful; unlike the *Hertzberg* plaintiff, the Commission

did not attempt to establish unlawful termination at trial. *See* 261 F.3d at 657. Instead, the EEOC argues, as in *Townsend*, that Suppo should receive backpay for for wages lost "as a result of having been forced to take unpaid leave." 995 F.2d at 693; *see* EEOC Br. 46-48. *Hertzberg*, by contrast, concerns "[a] victim of discrimination that *leaves* his or her employment as a result of the discrimination," and requires that such victims "must show either an actual or constructive discharge in order to receive" backpay. 261 F.3d at 659 (emphasis added).

The EEOC does not argue, as Costco claims, that "Suppo's leave was equivalent to a constructive discharge." Costco Resp. 31. For the same reason, Costco's assertion that "this Court has consistently held that taking a leave of absence and failing to return to work is *not* sufficient evidence of a constructive discharge," *id.*, is irrelevant to this appeal. The cases Costco cites for that proposition hold that an employee must quit in order to establish constructive discharge, a proposition that the EEOC does not contest here. None of those decisions involve an employee who, as in *Townsend* and the present case, "was forced to take unpaid leave" and lost wages due to "severe psychological distress" stemming from the employer's unlawful employment action. 995 F.2d at 693.[3] Therefore, it is *Townsend* that controls.

[3] *See Chapin v. Fort-Rohr Motors, Inc.*, 621 F.3d 673, 675-81 (7th Cir. 2010) (rejecting claim of constructive or actual discharge where an employee did not return to work after a manager told him to withdraw his EEOC charge, the employer subsequently told the employee he was not fired and could return to work, and the employee responded that he would return to work after finishing a "painting project"); *Jordan v. City of Gary*, 396 F.3d 825, 837 (7th Cir. 2005) (rejecting constructive discharge claim of an employee who acknowledged that she

Costco refers to an alleged concession by the EEOC on this Court's constructive discharge doctrine, but it is not clear what point Costco believes the EEOC concedes. Costco Resp. 31 ("*Townsend* cannot be understood to allow back pay for an employee who goes on leave but never returns. Indeed, that theory has subsequently been foreclosed by courts through the evolution of the law of constructive discharge in this jurisdiction—a fact the EEOC concedes."). Costco cites to a section of the EEOC's principal and response brief that explains that "*Townsend* did not rely on a constructive discharge theory" and that *Townsend* "distinguished prior backpay decisions that involved constructive or actual discharge." EEOC Br. 53. That is, the EEOC's brief merely observed that constructive discharge doctrine was not relevant to *Townsend* or the present case.

B. *Hertzberg* did not overrule *Townsend*.

The EEOC's principal and response brief explained that the district court incorrectly concluded that *Hertzberg* overruled *Townsend*. *Id.* at 52-53. *Hertzberg* did not discuss *Townsend*, and *Hertzberg* did not confront a scenario where an employee sought backpay for wages lost during unpaid leave. Moreover, *Townsend* effectively addressed *Hertzberg*'s reasoning by distinguishing decisions that discussed backpay in the context of constructive or actual discharge. *Townsend*, 995 F.2d at 693. As this Court observed in *Townsend*, those decisions were inapposite

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did not quit; instead, her employer terminated her because she was absent without leave); *Curry v. City of Chi.*, No. 10-cv-7153, 2013 WL 884454, at *5 (N.D. Ill. Mar. 8, 2013) (opining that an employee who began disability leave shortly after receiving a layoff notice could not pursue constructive discharge claim because she did not quit; noting that the employee stated that she sought disability leave to "mitigate her damages" from the impending layoff).

because they involved "plaintiff[s] ... claiming damages as a result of having been terminated," rather than "as a result of having been forced to take unpaid leave." *Id.* The same reasoning applies to *Hertzberg*: it is irrelevant because the plaintiff there sought damages stemming from her separation with the employer, rather than, as in this case, as a result of being forced to take leave and rendered unable to work because of the employer's discriminatory conduct. 261 F.3d at 655-66. Moreover, in *Hertzberg*, the plaintiff sought backpay for constructive discharge after the jury rejected her discriminatory discharge claim, *id.* at 657, 660-61, while backpay for Suppo would be consistent with the jury's finding that Costco was liable for Suppo's acute emotional distress.

Nevertheless, Costco asserts that "*Hertzberg* both implicitly and in effect overruled" *Townsend* because "*Hertzberg* specifically rejected the 'but for' causation arguments advanced by the plaintiff in *Townsend* and by the EEOC in this case." Costco Resp. 29. But because *Hertzberg* and *Townsend* involve entirely different fact patterns—an employee who left her employment versus an employee who was forced to go on leave—*Hertzberg*'s discussion of "but for" causation is not relevant in a *Townsend* scenario.

In *Hertzberg*, "but for" causation was insufficient because this Court has articulated a specific standard to establish constructive discharge. It was important for the *Hertzberg* court to hold the plaintiff to that standard because the distinction between voluntary separation and constructive discharge has implications beyond backpay. *See Green v. Brennan*, 136 S. Ct. 1769, 1779 (2016) (rejecting arguments

that "a constructive discharge is tantamount to a formal discharge for remedial purposes exclusively" and that "the constructive-discharge doctrine merely allows a plaintiff to expand any underlying discrimination claim to include the damages from leaving his job"). For example, a constructive discharge may qualify as tangible employment action that precludes an employer from asserting, in a hostile-work-environment suit, the affirmative defense articulated in *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). *Pa. State Police v. Suders*, 542 U.S. 129, 140-41 (2004) (holding that a constructive discharge "precipitate[d]" by "a supervisor's official act" is a "tangible employment action"). Also, whether an employee's separation is deemed voluntary or a constructive discharge may affect the employee's deadline to initiate administrative process. *See Green*, 136 S.Ct. at 1776 (holding that a constructive discharge claim accrues when an employee resigns).

Moreover, the reasons for the distinction between constructive discharge and "ordinary" harassment do not apply in a *Townsend* scenario. First, a harassment victim "is expected to remain on the job while seeking redress of the harassment" unless her working conditions are sufficiently "intolerable" to constitute constructive discharge. *Hertzberg*, 261 F.3d at 658. But an employee who is "forced to take unpaid leave" due to "severe psychological distress," *Townsend*, 995 F.2d at 693, cannot "remain on the job while seeking redress of the harassment." In this case, where, the EEOC argues, Suppo was unable to work at *any* job due to Costco's unlawful action, the "remain on the job" expectation would not have encouraged

Suppo to stay in the workplace. Second, harassment "ordinarily does not have the sort of concrete economic effect required" to justify backpay. *Hertzberg*, 261 F.3d at 660 (quoting *Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1219 (8th Cir. 1997)). However, a harassment victim who loses wages because she is "forced to take unpaid leave," *Townsend*, 995 F.2d at 693, experiences such a "concrete economic effect" because she sustains a "differential in compensation. *Hertzberg*, 261 F.3d at 660 (quoting *Caviness*, 105 F.3d at 1219).

C. The Civil Rights Act of 1991 did not invalidate *Townsend*.

As the EEOC explained, nothing in *Townsend* suggests that the Civil Rights Act of 1991 altered the equitable remedies available under Title VII before the amendments. EEOC Br. 54-55. Costco misunderstands *Townsend* when it responds that the decision "addressed the award of back pay within the limited remedies available under the pre-1991 version of Title VII." Costco Resp. 27; *see also id.* at 29. *Townsend* addressed the availability of backpay both before *and* after the amendments, and underscored that the amendments did not alter Title VII's backpay remedies.

Significantly, although the unlawful employment action in *Townsend* occurred before the amendments, *Townsend* was decided *after* Congress enacted the 1991 amendments. 995 F.2d at 692-694. The plaintiff argued that the amendments applied retroactively, and that she was entitled to certain rights authorized under the amendments: a jury trial and the right to pursue compensatory and punitive damages in addition to backpay. *Id.* at 693-94; *see* Civil Rights Act of 1991, Pub. L.

No. 102-166, § 102, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a). As discussed previously, EEOC Br. 54, *Townsend* declined to determine whether the amendments had retroactive effect because, at the time, the retroactivity question was pending before this Court en banc and before the Supreme Court. 995 F.2d at 694. The panel acknowledged that "the unresolved issue of the retroactivity of the [Title VII amendments]" could create "uncertainty" as to how the district court should proceed on remand because it was unclear whether the plaintiff was entitled to a jury trial. *Id.*[4]

Townsend assumed that, regardless of how the en banc Seventh Circuit and the Supreme Court ultimately ruled on retroactivity, the plaintiff could pursue backpay for wages lost when she was on leave because "the statute does not key the plaintiff's rights to termination, but to discrimination." *Id.* at 693-94. Therefore, it is apparent that the panel believed that *identical backpay remedies* were available both before the 1991 amendments and after the 1991 amendments. Nor did *Townsend* express any doubt that, should the amendments apply retroactively, the plaintiff would be entitled to pursue backpay in addition to compensatory and punitive damages. *See id.* at 694. Therefore, Costco's assertion that *Townsend* "justified awarding back pay" only because the plaintiff "would not [otherwise] have been entitled to any remedy" makes little sense. Costco Resp. 30. On the contrary,

[4] The Supreme Court and the en banc Seventh Circuit later decided that the 1991 amendments did not apply retroactively. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 247 (1994); *Mojica v. Gannett Co.*, 7 F.3d 552, 562 (7th Cir. 1993) (en banc).

Townsend made clear the employee's alleged "diminution in wages" distinguished her from harassment victims who did not lose wages. 995 F.2d at 693.

Costco argues that *Hertzberg*'s discussion of the 1991 amendments forecloses backpay here, Costco Resp. 30-31, but again elides the distinction between *Hertzberg* and *Townsend*. Costco quotes, *id.* at 30, portions of a passage that states in full that "the 1991 Act also left undisturbed the showing that a plaintiff must make to obtain equitable relief: A victim of discrimination that leaves his or her employment as a result of the discrimination must show either an actual or constructive discharge in order to receive the equitable remedy." *Hertzberg*, 261 F.3d at 659. But this passage refers to an employee who "leaves his or her employment," not an employee who is "forced to take unpaid leave." As explained previously, *Hertzberg* did not confront the fact pattern raised in *Townsend* and has no relevance to the present case. *Supra* at 7-10; EEOC Br. at 51.

D. *Townsend*'s approach furthers the goals of Title VII and is consistent with decisions excusing mitigation for employees rendered disabled by an employer's unlawful action.

In addition to explaining that authorizing backpay to employees in Suppo's position is consistent with *Townsend*, the EEOC argued that permitting backpay also furthers Title VII's goals and accords with the principle that mitigation is excused where the employer's violation of the statute renders an employee disabled. *Id.* at 48-51. *Townsend*'s approach advances Title VII's "central statutory purpose[] of ... making persons whole for injuries suffered through past discrimination," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975), because, as this Court

recognized, under certain circumstances an employee may lose wages due to unlawful discrimination even if she does not separate from her employer. *Townsend*, 995 F.2d at 693; *see* EEOC Br. 48-49. And *Townsend*'s reasoning reflects the same logic underlying decisions that hold that "an employee who cannot mitigate damages because of the unlawful actions of the employer can still receive back pay." *Johnson v. Spencer Press of Me., Inc.*, 364 F.3d 368, 384 (1st Cir. 2004); *see* EEOC Br. 50-51.

Costco terms EEOC's discussion of Title VII's goals and mitigation doctrine "policy arguments" and claims that the EEOC "urges this Court to rewrite the law" and endorses "a significant departure from Seventh Circuit law." Costco Resp. 33, 35. On the contrary, the EEOC asks this Court to apply *Townsend*, an existing Circuit precedent. The EEOC invokes Title VII's goals and mitigation doctrine to illustrate that *Townsend*'s approach to backpay reflects the statute's broader purposes and is consistent with how other courts of appeals have treated backpay awards. For the same reason, EEOC's "policy arguments" are not waived, as Costco suggests. *Id.* at 33, 35. The EEOC discusses these issues to support the argument that the Commission asserted in the district court and on appeal: that *Townsend* is the relevant precedent and should be applied. *See* R.255 at 1-2 / 14379-80 (ECF No. 14-2) (EEOC Mot. for Backpay); R.267 at 1-2 / 14509-10 (EEOC Reply Supp. Mot. for Backpay); EEOC Br. 46-51.

Moreover, Costco's attempts to undermine EEOC's "policy arguments" do not succeed. First, Costco argues that "allowing back pay in this case does not further

the goal of Title VII, as enacted and amended by Congress in 1991 ... []and is in fact contra to[] the goals of Title VII." Costco Resp. 34. But as discussed *supra* at 10-12, *Townsend*'s logic is not limited to the pre-amendments Title VII; the decision correctly assumes that identical backpay remedies were available both before and after the 1991 amendments. 995 F.2d at 693-94. And, as *Hertzberg* emphasized, the amendments "left undisturbed the equitable remedies available under Title VII," 261 F.3d at 659, which included—under *Townsend*—backpay for employees rendered unable to work due to the employer's unlawful employment action. Costco adds that "Title VII today, as compared to the pre-1991 version on which the EEOC is relying *vis a vis Townsend*, has sufficient remedies available to make a plaintiff whole." Costco Resp. 34. However, it strains credulity to infer that Congress would preserve backpay remedies for one category of employees—those who lost wages due to constructive discharge—while eliminating backpay for another category—those who lost wages because forced to go on leave due to the employer's unlawful action, particularly because, as *Townsend* emphasizes, Title VII "does not key the plaintiff's rights to termination, but to discrimination." 995 F.2d at 693.

Second, Costco seeks to distinguish factually some of the decisions that the EEOC cited to demonstrate that courts may excuse mitigation where an employee "cannot mitigate damages because of the unlawful actions of the employer." *Johnson*, 364 F.3d at 384; *see* Costco Resp. 35-36. Costco disregards that the Commission highlighted these cases for a general proposition that reinforces the logic of *Townsend* (rather than for any analogous factual patterns) but Costco does

not question the underlying principle that the EEOC highlights. In particular, Costco differentiates *Durham Life Insurance Co. v. Evans*, 166 F.3d 139 (3d Cir. 1999), and *Lathem v. Department of Children & Youth Services*, 172 F.3d 786 (11th Cir. 1999), on the ground that the district court did not find a causal link between Costco's unlawful action and Suppo's leave of absence and lost wages. Costco Resp. 36. But, as explained *supra* at 2-3, the district court never reached a finding on causation because it disposed of the EEOC's backpay motion on a threshold question. Costco also argues that, unlike the plaintiffs in *Durham Life* and *Lathem*, "Suppo cannot show that her inability to work was caused by Costco" because "numerous other, independent factors" contributed. Costco Resp. 36-37. However, as discussed *infra* at 2-3, the EEOC believes that causation should be addressed by the district court on remand and, in any event, disagrees with the evidence Costco cites.

III. Although this Court should remand for a determination by the district court, the trial record supports a backpay award for Suppo under the *Townsend* standard.

Finally, Costco argues that even if *Townsend* applies, this Court should affirm the district court's denial of backpay. To begin, Costco asserts that the present case is distinguishable from *Townsend* because "[h]ere, unlike *Townsend*, there was no finding that Costco 'caused' Suppo's emotional distress." Costco Resp. 38. Costco also appears to assert that neither the jury's verdict nor the record supports a finding that Costco caused Suppo's unpaid medical leave and inability to work. *Id.* (accusing the EEOC of "misrepresent[ing]" the jury's verdict as a finding that Costco caused Suppo's unpaid medical leave). Also, Costco argues that the

EEOC cannot show that Costco caused Suppo's inability to work because other factors contributed to it. *Id.* at 36-39. Finally, Costco claims that *Townsend* does not authorize backpay for the period after Costco terminated Suppo. *Id.* at 39-41.

Costco's arguments are unavailing, as they are based on a misreading of *Townsend* and the EEOC's position on appeal. Costco also discounts the jury's verdict, mischaracterizes the record, and muddles causation and mitigation.

A. The trial record amply supports a district court finding that Costco's unlawful action caused Suppo's emotional distress and lost wages.

Costco argues that this case differs from *Townsend* and other decisions because there is insufficient evidence that Costco caused Suppo's emotional distress and lost wages. As explained *supra* at 1-2, the EEOC fully acknowledges that the district court has not yet reached a finding of causation, since the district court concluded, as a threshold matter, that the EEOC could not seek backpay. As an initial matter, we note that there was no finding of causation in *Townsend* either, although Costco attempts to distinguish *Townsend* on this ground. Costco Resp. 37-38. Contrary to Costco's assertion, *id.* at 37, the *Townsend* district court did not address causation; instead, it held that the plaintiff could not obtain backpay because she "had not been fired or demoted." 995 F.2d at 692. This Court rejected that reasoning, emphasizing that the employee was entitled to backpay "*if* the assaults caused severe psychological distress that in turn caused her to lose ... wages," and remanded to the district court. *Id.* at 693 (emphasis added).

Moreover, Costco's characterization of the jury verdict and the record does not withstand scrutiny. First, although Costco suggests that the EEOC

misrepresents the substance of the jury verdict, Costco Resp. 38, Costco does not deny that the jury found that "the EEOC prov[ed] Dawn Suppo suffered emotional harm *as a result* of the harassment at Costco," R.247 at 1226 / 14263 (Trial Tr. Vol. 8) (emphasis added). This finding provides a basis for the district court to determine, on remand, that Costco's unlawful employment action "caused [Suppo] severe psychological distress." *Townsend*, 995 F.2d at 693. Although the district court must make the final determination as to whether the evidence supports a backpay award under the *Townsend* standard, the jury's finding warrants deference. "When assessing back pay ... the judge must respect the findings implied by the jury's verdict." *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000).

Costco claims that "there was no finding that Costco 'caused' Suppo's emotional distress, only that she—in fact—suffered emotional harm as a result of [customer Thad] Thompson's alleged harassment." Costco Resp. 38. But Costco is splitting hairs, as the jury found Costco liable for Thompson's harassment. *See* R. 247 at 1226 / 14263 (Trial Tr. Vol. 8) (jury finding that "Costco knew or should have known about the harassment and that Costco failed to take reasonable steps to correct or prevent the harassment"); *see also Townsend*, 995 F.2d at 692 (explaining that the plaintiff "attributed" her "symptoms of acute psychological distress ... to the sexual assaults *and the failure of [her employer] to take any remedial measures*") (emphasis added).

The jury verdict would also support a finding by the district court on remand that Suppo's emotional distress "caused her to lose work and as a result wages." *Id.* at 693. That is, the jury awarded Suppo $200,000 in emotional distress damages and $50,000 in pecuniary damages for "treatment expenses resulting from the harassment." R.247 at 1226 / 14263 (Trial Tr. Vol. 8). The trial record established that Suppo received [redacted] after going on medical leave from Costco, [redacted], and could not work for several years. *See, e.g.*, R.191 (Pl. Ex. 33); R.211-36 (Def. Ex. 16.5); R.211-39 (Def. Ex. 16.8); R.211-48 (Def. Ex. 16.17); R.211-51 (Def. Ex. 16.20); R.211-52 (Def. Ex. 16.21); R.240 at 138-39, 143-44 / 13166-67, 13171-72 (Trial Tr. Vol. 2); R.241 at 519-21 / 13549-50 (Trial Tr. Vol. 3); R.243 at 821-22 , 856 / 13852-53, 13887 (Trial Tr. Vol. 5). The jury's damages award makes clear that it viewed Suppo's emotional distress as significant (and caused by Costco) and concluded that she justifably received treatment for that distress. Again, the jury's determination warrants deference on remand. *Pals*, 220 F.3d at 501.

Second, Costco argues that there were "multiple other causes that resulted in Suppo being unable to work," and seeks to distinguish *Townsend*, *Durham Life*, and *Lathem* on that ground. Costco Resp. 36-38. To begin, the EEOC disagrees with Costco's characterization of the evidence supposedly establishing "multiple other causes," and the parties' different views of the evidence only underscores that causation is a matter for the district court. For example, Costco asserts that [redacted], citing a diagnosis by its expert witness, *id.* at

39, but the EEOC vigorously contested that diagnosis at trial. *See, e.g.*, R.240 at 141, 164-65 / 13169, 13192-93 (Trial Tr. Vol. 2); R.242 at 697-710, 715-17, 729-31 / 13727-40, 13745-47, 13759-61 (Trial Tr. Vol. 4); R.243 at 853-54 / 13884-85 (Trial Tr. Vol. 5).

Costco also faults Suppo because she did not see a therapist in the years leading up to the time when she worked at Costco. Costco Resp. 38. But the EEOC has argued that Suppo did not require treatment during that period, *see* R.245 at 1131 / 14162, and Costco points to no authority for the idea that Suppo was required to pre-mitigate her damages through expensive therapy sessions. The jury was properly instructed that it "may not deny or limit [Suppo's] right to damages ... because any injury resulted from an aggravation of a pre-existing condition," R.245 at 1203-04 /14234-35 (Trial Tr. Vol. 7), and the same principle applies to Suppo's backpay. Also, Costco implies that a finding of causation would be insupportable because Suppo could have returned to work after "Thompson was barred for life from Costco," Costco Resp. 36, but omits that it revoked Thompson's membership several months after Suppo began medical leave, and only after Thompson screamed profanity and aggressively approached Suppo at the Mettawa Costco, in violation of Suppo's stalking no-contact order. R.240 at 137-38 / 13165-66 (Trial Tr. Vol. 2); R.241 at 390-93 / 13419-22 (Trial Tr. Vol. 3).[5] Moreover, although the jury

[5] As previously explained, EEOC Br. 14-16, Costco initially declined to bar Thompson from the Glenview Costco after Suppo began medical leave in September 2011. R.240 at 134-36 / 13162-64 (Trial Tr. Vol. 2); R.243 at 773 / 13804 (Trial Tr. Vol. 5). Later, Costco asked Thompson not to shop at Glenview but did not inform

heard the evidence that Costco highlights, it still found Costco liable for harassment and awarded Suppo significant emotional distress and pecuniary damages.

Third, Costco appears to conflate causation and mitigation. For example, some of Costco's assertions—such as its claims that Suppo stopped receiving [redacted] in 2013, and that Suppo supposedly did not [redacted]—are relevant to mitigation rather than whether Costco caused Suppo to lose wages. Adding to the confusion, some of Costco's citations regarding Suppo's [redacted], while others are dated in 2011 or 2012, after Suppo began medical leave. *See* Costco Resp. 38. Just as the district court has not yet reached the question of causation, it also has not reached the question of mitigation. Mitigation is thus an appropriate inquiry on remand, not an issue for this Court to decide on appeal. And, again, the parties have a different view of the record evidence as to mitigation, which the district court should resolve.

B. *Townsend* authorizes backpay for the period after Costco terminated Suppo.

Costco argues that the EEOC may not obtain backpay for Suppo for the period after Costco terminated her, because "*Townsend* only considered the question of back pay for an employee on leave, not for a terminated employee." *Id.* at 40. Costco appears to make two points: (1) *Townsend* does not authorize back pay for an

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Suppo of this decision until November 2011. R.240 at 136-37 / 13164-65 (Trial Tr. Vol. 2).

employee who has been terminated while on medical leave; and (2) the EEOC cannot establish that Suppo would have continued working.

As to the first point, nothing in *Townsend* bars the EEOC from pursuing backpay for Suppo after her termination. Costco terminated Suppo in November 2012 because her medical leave of absence had extended more than twelve months. EEOC Br. 15-16 (citing R.239 at 13 / 13041 (Trial Tr. Vol. 1)). That is, Suppo's termination directly resulted from her medical leave. Therefore, Suppo's lost wages *after* her termination also meet *Townsend*'s standard: the unlawful action "caused severe psychological distress that in turn caused her to lose work and as a result wages." 995 F.2d at 693.

Costco asserts that "[t]he EEOC does not challenge the District Court's finding that Suppo was lawfully discharged," citing the district court's summary judgment opinion. Costco Resp. 40 n.20. However, although the EEOC agrees that Costco terminated Suppo because she was unable to return to work from medical leave, the Commission has never acknowledged that Suppo was "lawfully discharged." *See* R.267 at 2 n.2 / 14510 (EEOC Reply Supp. Mot. for Backpay). The district court did not deem Suppo's termination lawful; it only determined that the termination was not a constructive discharge. R.104 at 23 / 1802 (ECF No. 14-2) (Summ. J. Op.).

As to the second point, again, this is a matter for the district court, particularly because the parties disagree on the record evidence. Costco asserts that "Suppo cannot show that she would have remained employed" after the date of her

termination. Costco Resp. 40. But, again, Suppo's termination occurred because of her lengthy medical leave. The trial record—including evidence that Suppo loved her work at Costco and received positive reviews and customer feedback—supports an inference that Suppo would have continued working at Costco had she not been forced to take medical leave. *See* R.240 at 88-97 / 13116-25 (Trial Tr. Vol. 2).

CONCLUSION

The EEOC asks this Court to reverse the district court's denial of backpay and remand for further proceedings consistent with *Townsend*. Additionally, as stated in the EEOC's principal and response brief, the EEOC urges this Court to affirm the district court's order denying Costco's motion for judgment as a matter of law and to uphold the jury's verdict that Costco subjected Suppo to a hostile work environment.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 28.1 and 32(a)(7)(B) and Circuit Rule 28.1 because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 5,786 words.

This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) and Circuit Rule 32 because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 12-point Century font in the text and footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 22, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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